

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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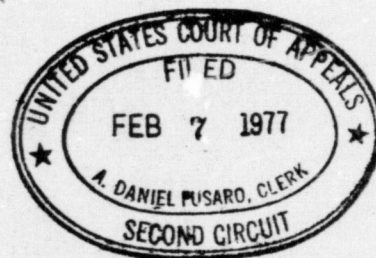
76-1011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-against- :
JOHN GWYNN, :
Defendant-Appellant. :
-----X

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REPLY BRIEF FOR DEFENDANT-APPELLANT



ZANE AND ZANE

ATTORNEYS FOR Defendant-Appellant

ONE ROCKEFELLER PLAZA
NEW YORK 10020
(212) 245-2222

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PRELIMINARY STATEMENT

It is well established that the crime of conspiracy and the completed substantive offense must be treated as two separate and distinct crimes, and that a conviction on the substantive offense is insufficient, by itself, to support a conviction on the conspiracy charge. Appellant respectfully submits that the government failed at trial to prove JOHN GWYNN's active and knowledgeable participation in the conspiracy to import and distribute illegal drugs, thereby mandating a reversal of JOHN GWYNN's conviction on the conspiracy count.

POINT I

AS A MATTER OF LAW, THE GOVERNMENT FAILED TO ESTABLISH THAT THE DEFENDANT, JOHN GWYNN, WAS A MEMBER OF THE CONSPIRACY CHARGED IN FIRST COUNT OF THE INDICTMENT AND THEREFORE THE CONVICTION AGAINST JOHN GWYNN ON THAT COUNT SHOULD BE DISMISSED.

The Government in its brief contends that there was more than sufficient evidence to convict JOHN GWYNN of the crime of conspiracy. However, the Government here, as at trial, fails to provide the substantive link which establishes GWYNN's participation in the conspiracy. The Government argues that because JOHN GWYNN purchased narcotics from members of a narcotics conspiracy, JOHN GWYNN was a member of that conspiracy. Such a position cannot be affirmed.

It cannot be overemphasized that more proof than mere possession or purchase of narcotic drugs must be adduced at trial to convict a party of conspiracy to import and distribute drugs. United States v. Koch, 113 F.2d 982 (2nd Cir. 1940); United States v. Quintana, 508 F.2d 867 (7th Cir. 1975).

In Koch, this Court stated that to convict a person of conspiracy to import and distribute narcotics it must be shown that the party charged knowingly associated in the unlawful common enterprise to import and distribute drugs unlawfully. (113 F.2d at 983). Mere knowledge of an unlawful possession of drugs by the seller and the illegality of the sale and subsequent possession by the buyer does not justify a finding that the buyer knew and participated in a conspiracy to import and distribute. United States v. Koch, supra. Even evidence that the amount of the drug purchased was for resale and

not for personal consumption does not establish knowledge and participation in a conspiracy. See, United States v. Koch, supra.

Mere association with participants in a crime does not constitute proof of participation in a conspiracy. See, United States v. Webb, 359 F.2d 558, 562 (6th Cir.), cert. denied, 385 U.S. 824, 87 S.Ct. 55, 17 L.Ed.2d 61 (1966). See also, United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940); United States v. Kelton, 446 F.2d 669 (8th Cir. 1971); Diaz-Rosenado v. United States, 364 F.2d 941 (9th Cir. 1966).

At bar, the Government at trial established the commission of a crime but not the defendant's knowing participation in a conspiracy. The evidence produced at trial never established that GWYNN possessed the requisite knowledge of the existence and extent of the conspiracy, nor that he actively associated with the members of the conspiracy in the furtherance of the conspiracy. Curiously, even the Government in its brief refers to GWYNN numerous times as only a "customer" of the conspiracy and not a participant.

[T]he core members of the conspiracy and partners in a narcotics enterprise, in turn sold this heroin to numerous customers on an almost daily basis, one of them being the appellant Gwynn....

Brief of United States at 4.

In the interim, Perna and Malizia [members of the conspiracy] visited their heroin customers, including Gwynn....

Brief of United States at 6.

See, also, Brief of the United States, at 18-19.

The Government also mentions that GWYNN never even met any of the heroin suppliers to the core group [Brief of the United States, at 18].

The overwhelming evidence demonstrates, and even the Government admits in its brief, that JOHN GWYNN was only a "customer" of the conspiracy who had no sales arrangement with the members of the conspiracy or any other connection with them. JOHN GWYNN had no obligation to buy drugs from the conspirators nor account for profits on their behalf. The testimony of the Government's witnesses at trial, Mario Perna and Ernest Malizia, support this position. Their statements concerning sales of heroin to GWYNN plainly demonstrate that they solicited GWYNN to purchase the narcotics [Brief of United States, at 6] and treated him as just another customer and not as a co-conspirator.

Over the next several days, Perna and Malizia went on their regular narcotics route visiting Gwynn and other regular customers to collect money and to determine whether Gwynn and the others wanted more heroin and, if so, to supply it. (Tr. 552-53). By late March, 1973, Perna and Malizia were still dealing with Gwynn who purchased additional heroin from them. (Tr. 572).

Brief of the United States, at 7.

Indeed, Mario Perna's list of names and numbers on which the Government relies as evidence to prove that GWYNN was a member of the conspiracy (offered at trial as Government Exhibit 1) only establishes that GWYNN was a customer of the conspirators who owed an outstanding debt to them. It is perfectly natural that the conspirators would keep records of their street sales and outstanding debts, since this drug

conspiracy was run very much like a business; it does not necessarily follow that everyone listed on a credit sheet is a member of the conspiracy. Therefore, it can only be concluded that JOHN GWYNN was merely an independent contractor who may have performed criminal acts jointly with the conspirators on occasion, but who had no knowledge of the existence of a conspiracy, who the participants in the conspiracy were or the extent of the conspiracy charge.

No matter how qualitative the PEOPLE's evidence on illegal possession and sale, the Government failed to establish that JOHN GWYNN knew or participated in a large scale conspiracy to import and distribute narcotic drugs.

The Government seeks to circumvent this lack of concrete proof by introducing evidence of a separate dealings between JOHN GWYNN and John Vasquez. (See, Brief of the United States, at 9-13). By attempting to create a second conspiracy between GWYNN and Vasquez, the Government fails to realize that, even assuming that the evidence produced at trial established the second conspiracy, the conspiracy charged in the indictment, which is the subject of this appeal, has not been established. It is the conspiracy charged in the first count of the indictment which must be examined and appellant steadfastly maintains that the Government failed to prove his knowledge or participation in the conspiracy charged in the first count of the indictment. Accordingly, GWYNN's conviction on that charge of conspiracy should be reversed.

The PEOPLE rely upon United States v. Ortega-Alvarez, 506 F.2d 455 (2nd Cir. 1974), cert. denied, 421 U.S. 910 (1975), and United States v. Steinberg, 525 F.2d 1126 (2nd Cir. 1975), to impute knowledge

of the conspiracy to GWYNN as a buyer. These cases are distinguishable. The "major buyers" in Ortega-Alvarez, to whom knowledge of the conspiracy was imputed, had each purchased huge amounts of heroin. The amounts purchased by GWYNN were relatively small, being designed for "street sale". Quantity alone cannot justify imputing knowledge of large scale conspiracy to GWYNN.

In United States v. Steinberg, supra, the presumption of knowledge of the overall conspiracy was imputed to the suppliers from the personal relationships and friendships among those on the supply level, and their awareness of the conspiracy on that level. At bar, JOHN GWYNN did not know any of the other buyers, suppliers or members of the core group of the conspiracy.

Since at trial the PEOPLE offered no proof that JOHN GWYNN either had actual knowledge or participated in a conspiracy to import and distribute illegal drugs, his conviction under the conspiracy indictment must be reversed.

CONCLUSION

For the above reasons, the conviction of the defendant, JOHN GWYNN, on the conspiracy indictment should be reversed and the indictment dismissed.

Respectfully submitted,

ZANE and ZANE,
Attorneys for Defendant-Appellant,
One Rockefeller Plaza,
New York 10020.

(212) 245 - 2222

James B. Zane,
Dennis M. Gonski,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-
Appellee, :

-against-

AFFIRMATION OF SERVICE

Docket No. 76-1011

JOHN GWYNN, :

Defendant -
Appellant. :
----- X

The undersigned attorney, duly admitted to practice in the courts of the State of New York, affirms the following to be true pursuant to CPLR 2106, under the penalties of perjury:

1. That he is ~~a member of~~ associated with the firm of ZANE and ZANE, attorneys for the Defendant-Appellant

2. That on the 7th day of February, 1977, your affirmant served the within Reply Brief

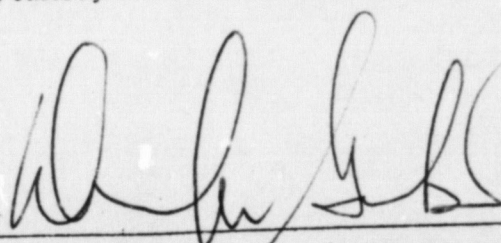
upon ROBERT B. FISKE, JR.

attorney(s) for Plaintiff-Appellee

at One St. Andrews Plaza
New York, New York

the address(es) designated by said attorney(x) for that purpose by depositing a true copy of same to each attorney enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: February 7, 1977.
New York, New York.


DENNIS M. GONSKI

